National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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Laborers Local 210 (Nichter Associates, Inc.), 3-CB-5319, 3-CE-50

584-0130, 584-2588, 650-8888-0100

This case was submitted for advice as to whether the Union violated Section 8(e) and 8(b)(3) by filing a grievance alleging that a signatory employer violated the contractual "anti-dual shop" clause where the clause is broad enough to make the contract binding on entities which are not a single employer with a signatory employer but where the grievance concerns a non-union operation which is a single employer with the signatory operation.

FACTS

Nichter Associates, Inc. ("Nichter, Inc.") has been party to successive collective bargaining agreements with Laborers Local 210 (the Union) since it was formed in the 1970's. In 1978, Paul Nichter, the owner and manager of Nichter, formed NAI to operate as a nonunion contractor. Nichter Inc. contends that, when NAI was created, owner Paul Nichter told Union Business Manager Ron Fino that he was creating a company to bid nonunion jobs and that company would not be used to do union work. Nichter claims that he promised that if an NAI bid "narrowly" beat out a union contractor, he would "do the job union." Fino claims that Paul Nichter told him NAI would not do work claimed by the Union and that Fino inferred that NAI was going to do residential work, which falls within the Union's jurisdiction but has traditionally been ignored by the Union.

At all times relevant to the instant case, Nichter and NAI were commonly owned and managed, shared equipment, office space and clerical staff and interchanged employees. The Region has concluded, and Nichter concedes, that the two companies were a single employer. The Region has also concluded that the employees of the two firms constitute a single appropriate unit.

The "Successors and Assigns" clause of the 1981 collective bargaining agreement signed by Nichter and the Union provides (Article XVII, Sec 3) that the contract shall be binding on "any business of any Employer which is formed wholly, or substantially in part, by the Employer or its stockholders in the same, similar or substantially related industry." The clause was continued unchanged in the 1984-1987 contract.

On October 1, 1984, the Union filed a grievance alleging that NAI was a "business . . . formed wholly or substantially in part" by Nichter Inc. within the meaning of Article XVII and that Nichter, Inc. had violated the contract by failing to pay Union wages and benefits on the jobs performed by NAI between 1982 and 1984. The grievance was arbitrated in four days of hearing between February and June 1988.1 In an award issued November 8, 1988, the arbitrator declined to find a violation of the contract based solely on the Union's claim that Nichter, Inc. and NAI are a single employer. He concluded that the Union knew NAI was performing commercial work since at least 1980. He further noted that the Union first entered into the Successors and Assigns clause in 1981 but filed no grievance against Nichter until 1984. In these circumstances, the arbitrator concluded, nonunion commercial construction work is not the "same, similar or substantially related industry" as union commercial work, so as to require the application of the contract to such work under the Successors and Assigns clause. Rather he concluded, the clause must be interpreted, at least with respect to the Union and Nichter, Inc., as an agreement that Nichter, Inc., would not use NAI in the "union sector," that is, in those jobs which would have gone to a union contractor had NAI not bid on the job.

ACTION

Although we conclude that the Successors and Assigns clause is facially violative of Section 8(e), that issue is already being litigated in a separate proceeding. Further we conclude that the Union's pursuit of grievance and arbitration against Nichter,

Inc. does not independently violate Section 8(e) or 8(b)(3) because that action involves no secondary application of the clause and, as interpreted by the arbitrator, involves no expansion of the unitl In these circumstances, we conclude that the charges should be dismissed, absent withdrawal.

We previously concluded in a case involving the same Union, albeit a different employer, that the Successors and Assigns Clause in the 1981-1984 and the 1984-1987 contracts is violative of Section 8(e) on its face because it is not restricted to circumstances where the two entities are a single employer and it is not protected by the construction industry proviso to Section 8(e). Laborers Local 210 (Shevlin-Manning, Inc., Cases 3-CB-5320, 3-CE-49, Advice Memorandum dated September 28, 1988. The Region issued Complaint and the hearing on that Complaint is now underway.2 The facial invalidity of the clause does not, however, compel the conclusion that every grievance filing under the clause is independently violative of Section 8(e). For it is equally clear that where the clause is applied to entities which are a single employer, the clause has no secondary application. 3 Thus, when the Board finds that a clause is facially violative of Section 8(e), its remedy requires only that the respondent cease and desist from enforcing the clause to the extent that the clause is illegal. Food and Commercial Workers Local 1442 (Ralph's Grocery), 271 NLRB 697, 700-701 (1984); Associated General Contractors of California (California Dump Truck Owners Assoc.), 280 NLRB No. 82, sl. op. at 19 (June 24, 1986). See also Plumbers District Council 16 (Jamco Development), 277 NLRB 1281, 1284 (1985) (unlawful self-help provision does not invalidate otherwise valid clause).

In the instant case, the Region has concluded that Nichter, Inc. and NAI are a single employer and that their employees constitute a single appropriate unit for bargaining. Thus, although the Section 8(e) charge is meritorious insofar as it alleges that the Successors and Assigns clause is facially invalid, the Union's grievance against these entities has no secondary implications and is not itself violative of Section 8(e).

Further, we conclude that the Section 8(b)(3) charge is without merit. Nichter, Inc. claims that the grievance filing is violative of Section 8(b)(3) on two grounds: the grievance seeks to enforce an unlawful clause and the grievance seeks to expand the bargaining unit. Since the grievance filing is not itself violative of Section 8(e), the derivative aspect of the 8(b)(3) charge must fall. As to the second allegation, if, as the arbitrator found, the Union acquiesced in the establishment of NAI to operate in the nonunion market, it might be argued that the Union thereby agreed to the establishment of separate bargaining units. See A-1 Fire Protection, Inc., 250 NLRB 217, 220-221 (1980). The Union's claim that it had not acquiesced was, however, neither patently frivolous nor contrary to any prior Board determination. In these circumstances, the Union's mere pursuit of the grievance-arbitration was not unlawful. See, e.g., Hotel & Restaurant Employees & Bartenders Int'l Union, Local 274 (Warwick Caterers), 282 NLRB No. 139, sl. op. at 6 (February 3, 1987). Further, in view of the arbitrator's conclusion that the only violation consisted of Nichter Inc.'s using NAI to operate in the union sector, the Union's grievance does not operate to expand the bargaining unit. Cf A-1 Fire Protection, 273 NLRB 964, 965 (1984) (distinguishing between a claim that the contract covers a separate company and a claim that work was diverted from the signatory to the separate company). There is, therefore, no basis for proceeding on the Section 8(b)(3) charge.

In these circumstances, issuing Complaint in the instant Section 8(e) case would add no remedy not already sought in the Shevlin-Manning case4. Accordingly, we conclude that further proceedings on the instant Section 8(e) case would not effectuate the purposes of the Act and the charge should be dismissed absent withdrawal. The Section 8(b)(3) charge should be dismissed as without merit.

H.J.D.

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1 Nichter originally refused the Union's demand to arbitrate and filed an action for a stay of arbitration, contending, inter alia, that the demand for arbitration was violative of Section 8(b)(4). The U.S. District Court for the Western District of New York denied Nichter's application for a stay and ordered it to arbitrate the grievance. Nichter Associates, Inc. v. Laborers International Union of North America, AFL-CIO, Local 210, CIV-85-433E (August 13, 1987), aff'd. No. 87-7769 (2d Cir. January 25, 1988) (summary order). The district court rejected Nichter's arguments that the Successors and Assigns clause was unlawful, noting that it was "disinclin[ed]" to agree with Nichter's claim and "more fundamental[ly]," on May 14, 1985, the Regional Director had already dismissed Nichter's Section 8(b)(4)(B) charge making the same allegation. Sl. op. at 4-5, n. 4. In

affirming the district court, the Second Circuit stated that Nichter's contention that the contractual clause is unlawful should be made in the first instance to the arbitrator and, if an arbitration award enforces the provision, to the court in opposing the enforcement of such an award. Sl. op. at 2.

2 In Shevlin-Manning, as in the instant case, the Union filed a grievance against the signatory employer alleging that it violated the Successors and Assigns clause by operating a nonunion company. Because the evidence indicated that the signatory and the nonunion operation were separate employers, we concluded, and the Complaint further alleges, that the Union independently violated Section 8(e) by instituting grievance-arbitration proceedings against Shevlin-Manning.

3 Primary application of a face invalid clause may, nevertheless, constitute the reaffirmation of the clause within the Section 10(b) period necessary to establish the "entering into" requirement of a Section 8(e) violation. Bricklayers Local 2 (Gunnar Johnson), 224 NLRB 1021, 1025 (1976).

4 [FOIA EXEMPTIONS 2 & 5]